MICHIGAN SUPREME COURT

PUBLIC HEARING
May 12, 2009

CHIEF JUSTICE KELLY: Good morning. This is our public hearing, and it's our opportunity to hear from you about proposed changes to rules, and we are prepared to entertain three minutes of presentation. First on Item #1 involving Rule 2.112 – Affidavit of Merit - Barry Gates.

ITEM 1: 2006-43, 2007-07 – MCR 2.112 Affidavit of Merit

MR. GATES: Good morning. May it please the Court. My name is Barry Gates; I'm the Vice President of the Michigan Association for Justice, formerly known as the Michigan Trial Lawyers. And I'm here today to speak on the proposed amendment to MCR 2.112(l). This Court is at one of those proverbial forks in the road with respect to this issue. If you follow one of those roads, you will take the holding in *Kirkaldy v Rim* and you will make it into a court rule as proposed. And if there's a deficient affidavit of merit, the case will be dismissed without prejudice, it can be filed within whatever number of days that are left on the statute of limitations at the time the case is dismissed. But to require that procedure is to enter into a very deficient - very inefficient and expensive method for litigants and for the trial courts to be involved in. The plaintiff will need to refile, will need to redraft the complaint, get a new affidavit of merit, file – prepare a summons, file the papers, pay $235, the court clerk will have to spend ten to fifteen minutes in opening up a new file, creating a new file, putting it into the system. The plaintiff will then have to serve the new case. The defendant will then have to file a new answer; file affirmative defenses. The trial court will need to enter new scheduling orders; schedule a new pretrial conference.

JUSTICE MARKMAN: Mr. Gates?

MR. GATES: Yes, sir.

JUSTICE MARKMAN: Granted everything that you say for the sake of argument, is it a good idea for this Court to be issuing court rules incompatible with its recent decisions?

MR. GATES: I think that the ruling in *Kirkaldy* applies to *Kirkaldy*. What's important for this Court to do –

JUSTICE MARKMAN: Well, it applies to all equally – not only to the parties in *Kirkaldy*, but it applies to all equally situated persons presumably, is that not right?

MR. GATES: It will until – unless amended.

JUSTICE MARKMAN: Okay.

MR. GATES: Absolutely. And the Constitution, art 6, §5, requires the Court to amend, modify, and simplify the rules of practice in this state.

JUSTICE MARKMAN: But my question is is it wise in your judgment for this Court to be issuing rules that are inconsistent with its published decisions; in particular, recently published decisions.

MR. GATES: It is wise if it is more efficient, more simple, more logical.

JUSTICE MARKMAN: Don't you think it causes some confusion to a person who has to accommodate their conduct to the dictates of the law having incompatible rules and decisions of this Court?

MR. GATES: When we have a new court rule, people – the trial courts, the appellate courts, and the litigants, most importantly, will have a roadmap as to how to go forward. Right now there are a number of issues that are unresolved by *Kirkaldy*. For instance –

JUSTICE MARKMAN: But this is not one of them, is it?

MR. GATES: Absolutely it is. What does it mean when it says it's – the case goes back to the point at which it was – whatever number of days were left on the statute of limitations at the time it was dismissed? Does the statute of limitations start to run again when the case is dismissed? Does it start to run again when – if the plaintiff files a motion for reconsideration; if the plaintiff files an appeal?

JUSTICE MARKMAN: It says – It says in *Kirkaldy* if that challenge is successful, that is to the validity of the affidavit, the proper remedy is dismissal without prejudice.

MR. GATES: Correct. And it goes on to say that the plaintiff may refile within whatever number of days are left on the statute of limitations. How will we know what number of days are left on the statute of limitations, your honor? We don't know if this statute of limitations resumes running on the day of dismissal. What if there's both an appeal of the order of dismissal, and the plaintiff has the new – case is filed. There's a dual track which is entirely inefficient. On the other hand, if the Court were to follow the

other path, the path that the State Bar has suggested, then there's but one case, there is but one set of discovery rules, the court file is one instead of two court files, thinking again about that clerk, and we have a situation where the litigants can know exactly what is expected of them. Right now –

JUSTICE HATHAWAY: Mr. Gats? Does MCL 600.2912d say anything about dismissal?

MR. GATES: Absolutely not. And that's the next point I would like to make. There's no reason not to amend the court rule in accordance with what the State Bar proposes. The – First of all, Justice Markman, you said in *Barnett v Hidalgo*, that an affidavit of merit is a pleading. A pleading is freely amendable in accordance with the court rule, 2.118. The Legislature, Justice Hathaway, has not stepped in. There is absolutely nothing in 2 – in the affidavit of merit - or the affidavit of meritorious defense statute that requires dismissal with prejudice, dismissal without prejudice, or any other particular remedy. So it is – you have in many respects a blank slate to write on with the exception that you are, in a way, deviating from what *Kirkaldy* has indicated the appropriate approach.

CHIEF JUSTICE KELLY: Mr. Gates? I'm gonna have to cut you off unless there are further questions from the bench. Thank you.

MR. GATES: Thank you, your honor.

CHIEF JUSTICE KELLY: Next is Item #2 which is a proposed amendment to Rule 611 of the Rules of Evidence. Mr. Michael Steinberg is here to give a statement. This deals with adopting an amendment to clarify that a judge is entitled to establish reasonable standards regarding the appearance of parties and witnesses to evaluate the demeanor of those individuals, and to ensure accurate identification. Mr. Steinberg.

ITEM 2: 2007-13 – MRE 611

MR. STEINBERG: Good morning Chief Justice Kelly and members of the Court. My name is Michael J. Steinberg, and I'm the Legal Director of the ACLU of Michigan. As you know from our eleven page comment, Christian, Jewish, Muslim, domestic violence organizations, and other social service agencies, have joined us in opposing the proposed amendment to MRE 611 as it's currently written. We are united in our belief that women should not be denied access to justice based solely on their religious dress. Because of the importance of religious freedom and democracy, the Michigan Constitution, like the constitutional laws of over twenty states, bars the government from instituting a rule that burdens religion unless it meets the strict scrutiny test. The proposed rule flaunts the religious freedom test. Clearly, the state does have a compelling interest in ensuring the identity of a witness and in assessing her credibility.

However, it is equally clear that requiring a woman to remove her nijab is not the least drastic means to achieving these interests. A female court officer can easily identify a woman just the way women in nijabs are identified when they enter a federal courthouse or at an airport by a female officer taking that woman into a separate room and identifying her through her ID. Additionally, the fears of not being able to assess an individual's credibility if she's wearing a veil are unfounded. Courts already admit testimony in a host of situations where the speaker herself does not even testify in court. This happens when the former trial testimony or deposition testimony of witnesses are read into the record by lawyers under other exceptions to the hearsay rule. The respected service of blind judges, such as former Wayne County Judge Paul Terranes, further highlights that visual analysis is not essential to credibility determination. Further, numerous studies have revealed that simply listening to the way witnesses testify and focusing on the consistency of their testimony is at least as affective if not more affective as watching the witness testify. In closing, if the Court adopts the proposed rule, we urge you to specifically amend the proposal to accommodate religious dress. Barring a segment of society from testifying in court is not only repugnant to our country's principles, but it would severely hamper the truth-seeking function of the court.

JUSTICE YOUNG: Sir?

MR. STEINBERG: Yes.

JUSTICE YOUNG: Where are the Sixth Amendment implications of your position?

MR. STEINBERG: The right to confrontation. We –

JUSTICE YOUNG: Would it be – would it be permissible to shroud a witness behind a screen so that the fact-finder could not see the witness testifying on cross-examination?

MR. STEINBERG: We would say no, and I'm speaking as the ACLU now not on behalf of all the organizations. The ACLU is very concerned about the confrontation clause.

JUSTICE YOUNG: Well, what is your –

MR. STEINBERG: And in that situation –

JUSTICE YOUNG: What is the implication of the slightly less substantial shrouding then to the Sixth Amendment?

MR. STEINBERG: Well, the two major purposes of the Sixth Amendment is to be able to cross-examine, which is clearly met here, and also to testify in the presence of the witness. And the purpose of that second prong is to ensure primarily that the witness is able to see the defendant under the theory that a person is more likely to tell the truth under the watchful glare or under the watch of the defendant. And if she's testifying behind a screen, she's not able to see the defendant. And so that's very different –

JUSTICE YOUNG: Nor is the defendant able to see the witness.

JUSTICE CORRIGAN: Well, what do you do with those cases Mr. Steinberg on the confrontation clause where the U.S. Supreme Court speaks in terms of the right of face-to-face confrontation?

MR. STEINBERG: If you look – and we've consulted with many criminal defense attorneys, and gone – you know really discussed this. We've spoken with perhaps the premier expert on confrontation clause, Richard Freeman of U of M Law School, and the primary requirement of face-to-face confrontation is to have the person there in the presence of the defendant. And, again, the witness is able to see the defendant, and that's all throughout the Supreme Court cases.

JUSTICE CORRIGAN: But those cases don't say eyes-to-eyes, they say face-to-face.

MR. STEINBERG: Well, if you –

JUSTICE CORRIGAN: Are there any cases that have interpreted this? I appreciate and respect Professor Freeman and the article that you cited, but I'm wondering whether any cases have construed this particular problem vis-à-vis the confrontation (inaudible)?

MR. STEINBERG: No, this is a unique issue in this country. The Canadian courts are now discussing it, and have reversed the decision to throw out the testimony of a woman in a nijab. It's been remanded and that's still ongoing. But most of the –

JUSTICE CORRIGAN: But they don't have similar confrontation right to do they, in Canada, as our construction.

MR. STEINBERG: I don't know.

JUSTICE CORRIGAN: Okay.

MR. STEINBERG: I don't know. I wish I was an expert on Canadian law, but – But we feel comfortable – you know being very strong advocates of the confrontation

clause, we feel comfortable in this, and it's gonna help not only – it's gonna – I mean I believe that prosecutors, most prosecutors, if they're trying to prosecute a person who is accused of sexually assaulting a woman in a nijab would be very much in support of our position, as well as you know the general right of a person to bring a person to justice.

JUSTICE MARKMAN: Is the ACLU purporting to speak for the prosecutors today?

MR. STEINBERG: No. No, but I have spoken with prosecutors and defense attorneys –

JUSTICE YOUNG: And you have their proxy.

MR. STEINBERG: Hmmm?

JUSTICE YOUNG: And you have their proxy.

CHIEF JUSTICE KELLY: I think he said that.

MR. STEINBERG: No, no, I don't.

CHIEF JUSTICE KELLY: Any other questions?

MR. STEINBERG: But it may be a good idea to get their input.

CHIEF JUSTICE KELLY: Thank you, Mr. Steinberg.

MR. STEINBERG: Okay, thank you.

CHIEF JUSTICE KELLY: Ashley Lowe.

PROFESSOR LOWE: Good morning, your honors, may it please the Court. My name is Ashley Lowe and I'm a professor at Cooley Law School. I also run the Family Law Assistance Project. We provide civil legal services for survivors of domestic violence, specifically in family law and domestic violence matters. And I personally have been involved in representing victims of domestic violence for about ten years. I'm here today to speak in opposition to this proposed amendment to Michigan Rule of Evidence 611 because of its likely negative impact on domestic violence survivors. Victims of domestic violence face horrible choices every single day. Does she leave her home in order to protect herself and her children and risk escalating the violence to a level of lethality that could end in her death and that of her children? Does she call the police when there is violence in the home and risk being prosecuted for failure to protect her children from that very same violence? These are the harsh realities of domestic

violence that we certainly can't solve here today. But there is one thing that we do know that can reduce domestic violence in the community and that is access to civil protection orders. Yes, it is just a piece of paper, and yes, it is enforcing laws that are already in place. But the mere act of a victim asserting her right and going to the court and seeking protection reduces violence for many women.

JUSTICE MARKMAN: What if the only violence that a woman suffered was being punched in the face? Would that evidence be available to the fact-finder in your understanding of the law?

PROFESSOR LOWE: I believe it could be in a number of ways. Certainly someone who could – in most cases when there's a –

JUSTICE MARKMAN: Explain precisely how that information would be made available to the fact-finder?

MS. LOWE: In a criminal prosecution for domestic assault?

JUSTICE MARKMAN: Yes.

PROFESSOR LOWE: I think in most situations when there is a criminal trial, the evidence, the physical evidence, is no longer there on the victim. Most of the time – say there is a broken bone or there is a punch and you would have a bruise on your eye, that's still not gonna be present when the –

JUSTICE MARKMAN: What if we have a preliminary exam or something and this focused on an incident that occurred two days ago? Would this be admissible in evidence?

MS. LOWE: I think there are ways that it could be brought into evidence certainly, your honor. That they could be –

JUSTICE MARKMAN: How?

PROFESSOR LOWE: That it could be testified to by a female doctor who had examined the victim herself.

JUSTICE MARKMAN: But this is in the interest of the victim of domestic abuse that perhaps the most glaring, the most direct evidence of the assault would be denied to the fact-finder is that correct?

PROFESSOR LOWE: Your honor, the evidence could be presented; it certainly could be presented, and it would be up to – I can't speak for the whole Muslim

community in what would be permissible and what wouldn't, but having – having that victim make the choice between her religious beliefs and seeking the court's protection is a choice that I don't think we should ask victims to make. One thing that happens with seeking the court's protection is the reason that those are effective is because it changes the power of dynamic in the relationship. What was once a secret, closely hidden and denied to the outside world relationship is now subject to public discussion and public acrimony. Domestic violence is about power and control, and when the courts intervene the batterer loses that power and that control. Of course, this is not true for every domestic violence victim, and PPOs certainly don't end all violence, but we know that they reduce some violence. And if they do, then we should not make someone make the decision between seeking that court's protection and complying with the tenets of their religion.

JUSTICE CORRIGAN: Would it be against the tenets of the Muslim religion to have a victim to be photographed in the hospital?

PROFESSOR LOWE: I'm sorry, your honor –

JUSTICE CORRIGAN: Do you know that answer?

PROFESSOR LOWE: I'm sorry, your honor, I don't know the answer to that question. I'm not an expert in the Muslim religion, and hopefully someone else will be able to answer that question for you today.

JUSTICE CORRIGAN: So the fact-finder would be deprived - it seems – I don't know the answer to the question either, but of the best evidence of the actual crime under our system of law that provides for confrontation the fact-finder would be deprived of that.

PROFESSOR LOWE: I don't know if a photograph would be a violation of the religion if someone were observing that.

JUSTICE MARKMAN: Well, would you be concerned about it if, in fact, a face, any face, proscribed even photographing a woman in a hospital with bruises on her face? Would you be concerned about the fact that even though it is the woman's choice whether or not to disclose those pictures and to disclose her face that by choosing not to do so that woman might indirectly result in later women being subject to the same abuse because that individual couldn't be most effectively prosecuted by the prosecutor?

PROFESSOR LOWE: There's certainly downsides, your honor, and I think –

JUSTICE MARKMAN: Has this been discussed in your organization?

PROFESSOR LOWE: There are decisions that have to be made – these are discussions that we have all the time in our organization about personal decisions that people have to make. And it's not always safest to get a PPO; it's not always safest to go to the court. Sometimes that makes it even more dangerous, but the victim has to make that decision in her own scenario, and say I know my batterer the best and I may make that call.

JUSTICE MARKMAN: What about the victim who hasn't yet come into play tomorrow, or next week, or the week after that? The victim who might have been avoidable if we'd been able to prosecute the defendant in the instant case for the abuse that he undertook? Are you concerned about those victims – those women who might become victims tomorrow but needn't have become victims if we could have prosecuted today?

PROFESSOR LOWE: And that's why I do – that's why we need to allow all victims to testify in a way that is consistent with their religious beliefs. If somebody is denied that opportunity to testify consistent with their religious belief, they may not testify; they may choose to not go forward.

JUSTICE CORRIGAN: You are a law professor at Cooley, correct?

PROFESSOR LOWE: Yes.

JUSTICE CORRIGAN: How do you deal with the U.S. Supreme Court statement that confrontation is a face-to-face right in our – under our system of laws? I mean isn't there a balancing that has to occur between the right you're asserting, and the rights that a confrontation clause guarantees to criminal defendants? What do you do about that problem?

PROFESSOR LOWE: Well, your honor, I have to defer to the constitutional law department at Cooley because I am not an expert in constitutional law nor the confrontation clause.

JUSTICE CORRIGAN: Okay.

PROFESSOR LOWE: I'm here to speak today –

JUSTICE CORRIGAN: So you're basically speaking for the domestic violence community supporting one right – it's our problem to try to figure out how these rights are reconciled with one another.

PROFESSOR LOWE: I'm actually here to present the – what I believe are the implications of this amendment, and the risks that are inherent if we say to people to have

to make this choice, and that we would be limiting this very powerful tool that we have in Michigan.

JUSTICE YOUNG: You're asserting –

PROFESSOR LOWE: The system that we have is excellent.

JUSTICE YOUNG: Miss? You're asserting a First Amendment right in support of your position, but you're not addressing the Sixth Amendment right.

PROFESSOR LOWE: I'm here to discuss –

JUSTICE YOUNG: Is that accurate? You said a woman should not be compelled to trade her First Amendment religious rights in this context. There's a – another constitutional right, the Sixth Amendment, which you are not addressing.

PROFESSOR LOWE: I am not addressing that you're right. But I would like to – I'm here to talk about the implications in the domestic violence community and the importance of this ability to come out and bring this – bring domestic violence into the courtroom and the risk that it won't be brought into the courtroom, that it will be kept at home in a secret place where it can continue on unfettered because it is secret and it is kept from the outside world. And the importance of bringing that and letting the courts take the power of control away from batterers.

JUSTICE MARKMAN: Have you given any thought or discussion to the contrary implications of denying to the prosecutor the most direct and compelling evidence of domestic abuse?

PROFESSOR LOWE: Yes, I've given it quite a bit of thought, but I believe it's one of those decisions that has to be made in the context of and given factual –

JUSTICE MARKMAN: So it's up to the individual victim and society has no interest at all in whether or not that victim is going to accommodate a disclosure of evidence that may prevent future victims from coming into being.

PROFESSOR LOWE: I believe that giving the victim the right to come forward in a way that's consistent with their religious beliefs is the best way to ensure that there is a reduction in domestic violence.

CHIEF JUSTICE KELLY: Thank you, Professor Lowe.

PROFESSOR LOWE: Thank you.

CHIEF JUSTICE KELLY: Next, Douglas Laycock.

PROFESSOR LAYCOCK: May it please the Court. I teach constitutional law at the University of Michigan, and today I'm representing the Baptist Joint Committee for Religious Liberty and the Michigan Conference of the United Church of Christ, and also speaking on my own behalf.

JUSTICE CORRIGAN: You need to say your name.

PROFESSOR LAYCOCK: Douglas Laycock, thank you, your honor. This is a rule about access to justice. For many – of course, there are a billion Muslims in the world and they understand their teaching in different ways and they're different degrees of devoutness, but for many of these women they simply will not testify, they will not contact the prosecutor, they will not bring their claims forward if they are required to remove the veil. To remove the veil would be to disobey her God, to shame her family, to humiliate herself, so for many of these women it's like asking one of us to testify in our underwear. We simply wouldn't do it even if we had to forfeit our claim. Now if the Court is concerned about the confrontation clause I'll try to address that, but that's no reason to apply this rule to civil cases and leave women vulnerable to any bad guy who wants to take advantage of them. If a merchant cheats her, if a bad driver runs over her, she can't come to court because she can't testify. She can't threaten credibly to take her case to trial; she can't bargain for a meaningful settlement. Now with respect to the confrontation clause and these other victims down the road you're concerned about your honor, you're not gonna be able to prosecute that case if you make it impossible for her to testify. It doesn't matter what the prosecutor wants, she won't call the prosecutor. She won't file her complaint in the first place. So if we want to prosecute these cases we have to make it possible for the victim to testify. Now there may be unusual cases where the rights of the defendant require a look at her face, and the judge may have to have discretion to deal with them. But that is certainly not the (inaudible) or the average case. As the previous speaker pointed out, most of these cases don't get to court until long after the injuries have healed in the particular context of the events (inaudible) –

JUSTICE MARKMAN: Well, professor, aren't you conceding the principle point here? All that the rule says is that the court has the discretion to undertake these decisions. It doesn't compel the judge to do that.

PROFESSOR LAYCOCK: Actually, I reread it this morning, your honor, it says the judge shall. I don't – I didn't bring the text to the podium with me, but if you want to make it discretionary that would certainly be an improvement.

JUSTICE MARKMAN: The court shall exercise reasonable control – that doesn't mean it has – it is invariably gonna exercise that reasonable control by requiring that a woman remove her face covering. It simply offers the court the discretion to

undertake what it thinks is reasonably necessary to ensure that the demeanor of persons may be evaluated by the fact-finder.

PROFESSOR LAYCOCK: Well –

JUSTICE YOUNG: Let me just follow up on that. Are – do – Is it your position that today a judge does not possess this power?

PROFESSOR LAYCOCK: I think today it's in a judge's discretion. He's got –

JUSTICE YOUNG: Okay. Well, then addressing the point that Justice Markman made, why does the expression of this in a rule transform this into something that is momentous? The court shall exercise reasonable control. What about that statement causes you to be concerned if you acknowledge, as you have, that that is in fact the case today?

PROFESSOR LAYCOCK: The rule is the judge shall exercise reasonable –

JUSTICE YOUNG: Shall exercise reasonable control –

PROFESSOR LAYCOCK: to ensure that demeanor evidence can be evaluated. Now –

JUSTICE YOUNG: You don't – you do not concede that right now every trial judge in this state has the authority to assure – ensure just that very thing.

PROFESSOR LAYCOCK: I do your honor.

JUSTICE YOUNG: Okay.

PROFESSOR LAYCOCK: Every judge has the discretion to ensure that today and is led to a case being dismissed, and – but I take this rule to say he must ensure access to demeanor evidence whether or not demeanor evidence is important in the case, and no matter what the balance of interest is between the Muslim witness and the person on the other side. And I believe there's gonna be – it is our tradition that we believe in demeanor evidence, but the studies show it doesn't work and I think there's gonna be very few cases where that sort of evidence is actually essential – actually essential to a case. I think today judges have discretion; they're probably inclined to exercise that discretion by requiring the witness to uncover. I think this rule would make it mandatory to require the witness to uncover, and I think the affect of that rule would be to deprive many of the Muslim women in Michigan of any access to our court system. They would be put beyond the protection of the laws (inaudible) –

JUSTICE MARKMAN: If we said that it wasn't mandatory, would that assuage your concerns?

PROFESSOR LAYCOCK: I think if it were not mandatory that would help, but I think what is needed – we have a large Muslim community in this state, I think what is needed is a clear directive from this Court that says the religious liberty interests – a judge shall take account of the religious liberty interest – make it at least a balancing test and preferably a presumption in favor of an exception.

JUSTICE MARKMAN: There's nothing in here that is at all explicit or indicates that it's directed toward Muslims is there? I mean –

PROFESSOR LAYCOCK: Well, this rule has a legislative history –

JUSTICE MARKMAN: There's 6 billion people in the world of different religious faiths, and this would presumably apply to all of them would it not?

PROFESSOR LAYCOCK: It applies to all of them, but it does not affect many of them. Most of us - this is not an issue. It's an issue for one religious group; that religious group had a – one member of that group had a case, that case provoked this rule, the history of that is all on the record your honor.

JUSTICE CORRIGAN: Professor Laycock? In *Maryland v Craig*, the U.S. Supreme Court dealt with the confrontation issue, and basically said you can't testify behind a screen.

PROFESSOR LAYCOCK: Right.

JUSTICE CORRIGAN: I have a hard time understanding how being in full veil is any different than being behind a screen for purposes of *Maryland v Craig*. I mean don't we have a major league issue with the clash between the First Amendment liberty – religious liberty problem, and the confrontation right under our Constitution? And how – I mean we're stuck with the oath to uphold our Constitution, and we have – you know we have this issue. Where do you see that; how do you see that being reconciled as a professor of law?

PROFESSOR LAYCOCK: Well, we've got – we've got two constitutional rights, and we have to protect as much of each of them as we can. I think the witness who is veiled is more directly confronted than the witness behind the screen.

JUSTICE HATHAWAY: Would you –

PROFESSOR LAYCOCK: The counsel gets to see gestures, bodily motion, and she has to look at the person she's accusing. Now –

JUSTICE HATHAWAY: Would you agree with the proposed addition if it had the language that the ACLU is suggesting which says provided, however, that no person shall be precluded from testifying on the basis of clothing worn because of sincerely held religious beliefs?

PROFESSOR LAYCOCK: Yes, I think – in fact, I think the proposed rule with that amendment would be better than the status quo.

JUSTICE YOUNG: Well, that simply overbalances the two competing constitutional rights in favor of the First Amendment, right? You concede that, right?

PROFESSOR LAYCOCK: I – yeah, I concede that, and I mean another way –

JUSTICE YOUNG: That's not a balancing.

PROFESSOR LAYCOCK: I understand, but you know their proposed amendment could be amended to make it a balancing. You could draft in a hardship exception to their amendment. I don't think the hardship is in fact going to appear very often. I mean a case about a facial bruise may well be one, but I don't think there's gonna be many of those cases. And there's certainly not gonna be many civil cases because the confrontation clause is simply not at issue there.

JUSTICE CORRIGAN: So you also favor restricting whatever rule there is to civil cases, do you?

PROFESSOR LAYCOCK: I may have misspoke. What I – if the Court is concerned about the confrontation clause, that concern does not apply to civil cases. There's no reason we cannot protect these witnesses in civil cases.

JUSTICE MARKMAN: Professor Laycock? What if a devout person of whatever faith said that his religion prohibits him from being cross-examined by a woman? Would that have to be respected in your judgment?

PROFESSOR LAYCOCK: That's – you know that's a harder case because I think the impact on the other litigant is considerably greater. It deprives that litigant of his choice of counsel.

JUSTICE YOUNG: It's just a different constitutional provision.

PROFESSOR LAYCOCK: No, it's a much greater intrusion because – you know what does confrontation protect against? Confrontation protects against the anonymous accuser who says something to the prosecutor and that gets reported to the jury. You don't get to cross-examine that person; you don't get to test that person's credibility in all sorts of ways. The veil is a veil small piece of it.

JUSTICE YOUNG: In front of the trier of fact – the jury or judge, right?

PROFESSOR LAYCOCK: Right.

JUSTICE YOUNG: That's essential to this. The context of the confrontation clause isn't a sterile exercise in cross-examination; it is cross-examination for the purpose of demonstrating the credibility of the witness in front of the jury, correct?

PROFESSOR LAYCOCK: Correct, your honor.

JUSTICE YOUNG: Okay.

PROFESSOR LAYCOCK: But seeing the witness's face turns out to be, in study after study, useless for assessing the credibility of the witness. I mean lawyers hang on to that; we've got a traditional of that, but it turns out when you actually test it –

JUSTICE YOUNG: So the Founders were wrong.

PROFESSOR LAYCOCK: Pardon?

JUSTICE YOUNG: The Founders were wrong.

PROFESSOR LAYCOCK: No, the Founders were right about confrontation; the Founders never addressed the issue that is before this Court today.

JUSTICE YOUNG: Well, why would dupe confrontation?

PROFESSOR LAYCOCK: Pardon?

JUSTICE YOUNG: I mean – I mean this – I don't understand the point that you're making. If the whole purpose here isn't to display for the purpose of the persons who must make the decision in the case, the jury, the credibility of the witness under cross-examination, I don't know why we would do this.

PROFESSOR LAYCOCK: It is about the credibility, but the question is what do you need to test the credibility. She will be there – she will be cross-examined, her tone of voice will be heard, her bodily gestures will be seen. The one thing we're taking

away is a view of the face and it turns out in study, after study, after study, the view of the face adds nothing to the assessment of credibility. It does not make people more accurate.

JUSTICE MARKMAN: Why do you think the district judges and the Michigan Judges Association who day, after day, after day are in a position of assessing the credibility of witnesses apparently disagree with you on that?

PROFESSOR LAYCOCK: Well, you know they don't know when they're right and when they're wrong your honor. You know we make our best guess about who's telling the truth and who's lying, but I don't think any of us believe that we detect all the perjury in the system.

JUSTICE MARKMAN: But are you willing to take the risk that maybe the assessment of credibility really does involve a much more textured consideration of all these factors? Are you willing to undertake that risk and compromise the system that's been one of the jewels of our civilization?

PROFESSOR LAYCOCK: I'm absolutely willing to take that risk because the alternative is to exclude a whole segment of our population from access to that system at all in any way. They cannot testify; they will not file – they will not appear.

JUSTICE MARKMAN: Well, there's 6 billion people in the world of diverse religious faiths and perspectives, and to accommodate 6 - our system to the different perspectives of these 6 billion people is an extraordinary undertaking wouldn't you suggest?

PROFESSOR LAYCOCK: It's an undertaking we made in the Constitution of the United States and the Constitution of Michigan. And it's an undertaking that our legislatures pursue as a policy matter year after year. And sometimes it's impossible, but usually it's not. We can make this work.

JUSTICE WEAVER: But you do believe we have to balance the confrontational with the –

PROFESSOR LAYCOCK: I do believe you have to balance the confrontation clause, but I think it's a mistake to put so much reliance on seeing the face as essential to credibility determinations.

JUSTICE WEAVER: Now can I ask you this. Did I hear you say you were representing – I know you're a professor – where are you a professor anyway?

PROFESSOR LAYCOCK: The University of Michigan.

JUSTICE WEAVER: Okay. And – but did you say you representing the Baptists and somebody else?

PROFESSOR LAYCOCK: The Baptist Joint Committee –

JUSTICE WEAVER: You're here as a professor and as a –

PROFESSOR LAYCOCK: I'm a member of the Michigan Bar your honor.

JUSTICE WEAVER: Okay.

PROFESSOR LAYCOCK: The Baptist Joint Committee for Religious Liberty is a religious liberty organization that represents fifteen Baptist Conventions and has many members in Texas. The Michigan Conference of the United Church of Christ is a mainline Protestant denomination. These are two groups that are concerned about freedom of conscience for themselves and for others.

JUSTICE WEAVER: And they've asked you to come and (inaudible) –

PROFESSOR LAYCOCK: And they've asked me to come and they have signed the ACLU statement.

JUSTICE WEAVER: and yourself as a professor and as a member of the Bar.

PROFESSOR LAYCOCK: Yes, Ma'am.

JUSTICE WEAVER: I got it.

CHIEF JUSTICE KELLY: Any other questions of Professor Laycock? If not, thank you, sir.

PROFESSOR LAYCOCK: Thank you, your honors.

CHIEF JUSTICE KELLY: Next is Nabih Ayad. Okay. Zeina Makki. Okay. Ginnah Muhammad.

MS. MUHAMMAD: Good morning. Justice – I don't know how to address – but I definitely say good morning to the Chief Kelly and the rest of the judges. And I've prepared a statement today to read, but I'm here to say that Judge Markman and Judge Young has – and I believe that if I was attacked on domestic violence and my face and teeth and everything was all messed up, I would want to take a picture and I would want to show it to the judge that's presiding over my case.

JUSTICE CORRIGAN: Would that violate your religious beliefs to be photographed and have that shown in court?

MS. MUHAMMAD: Well, I have a driver's license in Michigan, and –

JUSTICE CORRIGAN: You had to remove your veil to get the driver's license, correct?

MS. MUHAMMAD: Yes, Ma'am. They – excuse me, I'm sorry. They allowed me to make an appointment and a female took my picture. And so no, it was no violation toward your God. I just recently had cataract eye surgery, and the two surgeons were males, and I had my surgery with my veil on across my face. I talk to people on a daily basis, I'm in the public, I'm like a vendor so to speak. And so I sell to people and I talk to people all day and I work in the churches, I work in the hospitals, I work at the VA hospital. I deal with so many people. My religious beliefs has never come into play. I feel so normal and I'm very happy to be an American in the United States. I'm very happy to be able to practice my religion. The only time I came up on a problem I was supposed to read this, but I can't read it now. But the only time I came upon a problem is when I went to court and when I went to court I went there for help and I had to be turned away. I didn't want to be turned away from the court, but I didn't have a choice because he said that he said that either you forego your religion or your case is dismissed. At that point, I didn't know what to do because I obey the law. I honor my driver's license, I honor the police, I honor everyone. So I didn't want to disrespect the judge and try to tell him he was saying the wrong things, so I just thought the best thing to do is just walk away when he said I was dismissed. I didn't mean to cause all these problems, but Islam is here in America and we are Americans, we love the judicial system, and I hope that any woman that's dressed like me can come to the court – I don't want us to have to sit at home and feel like I can't come in and ask a judge to help me if I have problem. I can't handle these problems in my own hands. And so the courts is here to help me. So if I didn't have you guys who would I go to? That's all I have to say.

CHIEF JUSTICE KELLY: Thank you.

JUSTICE YOUNG: Can I ask you a question? Miss? Miss?

MS. MUHAMMAD: Yes.

JUSTICE YOUNG: Can I ask you a question?

MS. MUHAMMAD: Yes, sir.

JUSTICE YOUNG: Is it a violation of your religion to show your license to – picture to a male?

MS. MUHAMMAD: Yeah, I mean unless it's – you know if I'm out here and I'm breaking the law, of course, you know the –

JUSTICE YOUNG: If you go to the airport – if you fly, do you –

MS. MUHAMMAD: Well, normally when I go to the airport a female normally takes me to the side and she verifies me. As a matter of fact, I'm glad you asked that because in the court Chief Justice Kelly I had asked the judge could he please have a female identify me you know for my ID – anybody that he chose in the courtroom. I didn't pick anybody, I asked for a whole lot of things, but everything I asked for he said no. And so I would like to get that case heard because those people were definitely behind on me, and I wanted the judge to know that but I couldn't get no further.

JUSTICE YOUNG: But if you're stopped at a traffic stop and the officer asks to see your license what do you do?

MS. MUHAMMAD: If an officer asks to see my license, I would ask for a female officer.

JUSTICE YOUNG: Okay.

CHIEF JUSTICE KELLY: Thank you, Ms. Muhammad.

MS. MUHAMMAD: Thank you.

CHIEF JUSTICE KELLY: Wendy Wagenheim.

MS. WAGENHEIM: Good morning. My name is Wendy Wagenheim. As Vice Chair of the Task Force on Jewish Security and Bill of Rights for the Jewish Council for Public Affairs, I want to thank you for allowing me the opportunity to speak to you today. JCPA is an organization comprised of 14 national and 125 local, independent agencies. The mission is to serve as the representative voice of the American Jewish community. Through this network JCPA serves as a catalyst to heighten community awareness, encourage civic and social responsibility and involvement, and deliberate key issues important to the Jewish community. One of JCPAs primary goals is to protect, preserve, and promote a just American society. One that is both respectful of the myriad of the ethnicities and cultures in our country, and sensitive to our differences. We are committed to working toward strong interfaith understanding and positive working relationships with all faith communities. This goal requires that we work to protect the right of every religious group to freely exercise their religious beliefs. Although this

specific rule of evidence being discussed today does not appear to be directed at observant Jews, it is easy to imagine an analogous rule that could be adopted or interpreted to have just such an affect. For example, a rule that prohibited hats in a courtroom would force Orthodox men to choose between their religious obligation to way a yamaka or skull cap, and their fundamental right to testify in court. As important as this analogy, however, it is our belief that the constitutional protection of religious freedom only retains its meaning when it protects the right of every religion to follow its own practices. JCPA is committed to the notion that religious liberty should be afforded the highest level of constitutional protection even in situations where the particular religious practice at issue is not our own. After all, it is only when the free exercise protects everyone that it is able to protect the practices of anyone. To that end, we cannot stand by if someone, as our Muslim friend, is forced to choose between fulfilling a religious obligation and a right to testify in court. History teaches us that the security of the Jewish community, especially as a religious minority, is linked to the strengths of democratic institutions including the courts. We all suffer when a voice is not heard or when the government prevents women such as Ms. Muhammad from exercising her fundamental rights because of her religious beliefs. The American Jewish community has an ethical imperative, and this Court has a legal obligation to ensure that this country remains wedded to the Bill of Rights. Please do not allow Michigan courts to authorize the restriction of religious freedom for anyone. And on a personal note, I met Ms. Muhammad this morning, I could not see her nose or her mouth, but I did see her eyes and I heard her voice today, and I hope you did to. Thank you.

CHIEF JUSTICE KELLY: Thank you, Ms. Wagenheim. Rabbi Michael Zimmerman.

RABBI ZIMMERMAN: Madam Chief Justice, Justices of the Supreme Court, my name is Michael Zimmerman, I'm the Rabbi of Congregation Kehillat Israel here in Lansing. I am – obviously, I'm not a legal scholar, I speak to you today as a religious leader. And I've decided to forego my prepared remarks in response to what I've been hearing just now. And I must say and I've spent the last half hour or so in the presence of Ms. Muhammad, wearing her full burka, and I am struck that we have the contact that we have as we say in Hebrew – panim el panim – face-to-face. I am very much aware of her presence. I am imagining myself at this moment standing before the seven of you – if you were in full head covering and burka, I would feel no less nervous with this confrontation than I feel right now. It's also very striking to me the discussion about cases of abuse where there might be physical – physical scarring of some kind that could be used as evidence because this was not the case which has brought the proposed rule change to this Court. This specific case had absolutely nothing to do with that, and yet it is a clear case where an American citizen had to choose between their rights to a fair trial and their rights to appear in court, and their rights to practice their religious belief. I'm also thinking in the case in point if God forbid a case being discussed involved a woman who was sexually abused and there is clear physical evidence of breast or genital

mutilation, a Christian or a Jewish woman, would she want her pictures trumped up as – you know shown as public evidence for public display in a court of law. I think we have – if we want to encourage people to be able to use the systems of justice that we have available, then I think it is necessary to honor the First Amendment right to freedom of religion and at least as I understand it from my interpretation of panim el panim if I read the case of Moses in Chapter 34 of Exodus, it really doesn't matter whether the rest of the face is covered. Moses had to wear a veil over his full head when people cannot confront him. And similarly when he was up on the mountain and God wouldn't not let him see his face, I mean clearly there was an issue of eye to eye that was at the core of it.

CHIEF JUSTICE KELLY: Thank you, Rabbi. Barbara Niess.

MS. NIESS: Good morning Chief Justice Kelly, excuse me, and Justices of the Michigan Supreme Court. I'd like to speak on the proposed amendment to MRE 611, and like others, I have foregone my prepared remarks in response to what I've been hearing. I'm the Executive Director of Safe House Center which is an organization dedicated to supporting survivors of sexual assault and domestic violence in Washtenaw County. And Washtenaw County has a substantial population of Muslim women. We serve approximately 5,000 women and children a year at Safe House. And I've been in this work for approximately fourteen years, and therefore have worked with survivors – hundreds if not thousands on a state level and at a program level. Testimony has been given that state survivors have decisions to make everyday. Those decisions are central and integral to her personal safety and to her children's safety. And the criminal justice system is a part of that; it's seen as the backbone. When I talk to survivors, admittedly they come to us because we're a place of hope for them, and they see us as helpful and something that they can rely on. However, when we get to talking about the criminal justice system they have so many questions. And what has come to mind for me as I've been listening to the testimony and reflecting on this issue, it would just take one judge requiring the wearing of the headscarf or the nijab and there would be so many women that would just say I'm not doing it; I'm not going to – I'm not going to press charges, I'm not going to call the police, I'm just not going down that path because I'm not going to be ensured of my children's safety and my safety. The other piece to this though that has come to mind for me, as I you know obviously have staff at Safe House, we hire folks who are Muslim women and what if they were subpoenaed to court to testify on an issue in that situation and I wouldn't want to ask them to make a decision between their job and their faith. Also, I want to speak to the just the face piece. It is rare for an abuser who will just do one thing. It is a system of power and control. It is something that happens over and over and over again, and domestic violence isn't about just one punch to one face. It is a series of events that have culminated into this situation. And in closing, I am hopeful that we can have a solution to support and protect Muslim women. That is my earnest request.

CHIEF JUSTICE KELLY: Thank you, Ms. Niess.

MS. NIESS: Thank you.

JUSTICE MARKMAN: Counsel? Can I ask you one question?

MS. NIESS: Absolutely.

JUSTICE MARKMAN: Given that we're talking about a proposed rule that's not yet in being –

MS. NIESS: Exactly.

JUSTICE MARKMAN: what experience we've had in the past is presumably under the status quo that you favor.

MS. NIESS: Um hmmm.

JUSTICE MARKMAN: And you say this is a common problem – the abuse of – it would be a common problem that a great many women would not be – would be discourage from reporting their abuse to the police –

MS. NIESS: Yes, your honor.

JUSTICE MARKMAN: for fear that they might have to testify under these circumstances.

MS. NIESS: Um hmmm.

JUSTICE MARKMAN: Well, what in fact has been the reality there? Are there many instances in which women with the full nijabs have in fact been subject to abuse, and have or have not been discouraged from cooperating with the police?

MS. NIESS: Well, let me start from a global statistics and then –

JUSTICE MARKMAN: You're saying it's a substantial problem –

MS. NIESS: Yes -

JUSTICE MARKMAN: And I'm just trying to get you –

MS. NIESS: it is.

JUSTICE MARKMAN: to quantify that to some extent.

MS. NIESS: In our experience in Washtenaw County, 1 in 5 women who come to us having experienced domestic violence will report – that is our general population. And approximately ten percent of the folks that we serve are Muslim. And when we talk to Muslim women they are much less likely to be willing to report to the police for a variety of reasons.

JUSTICE MARKMAN: But that has nothing to do with the proposed rule that we're talking about obviously.

MS. NIESS: It has to do with the system as a whole –

JUSTICE MARKMAN: Okay.

MS. NIESS: and this would – I would see going to court as an essential part of the criminal justice system, and would keep them from in fact wanting to do that.

JUSTICE MARKMAN: But the question I have is what number of women who are not currently discouraged from going to court would in your judgment be discouraged from going to court by the new rule.

MS. NIESS: About seventy-five percent.

JUSTICE MARKMAN: Well, I'm trying to get a sense of what –

MS. NIESS: And if you want to get a number probably fifty or sixty a year in Washtenaw County.

JUSTICE MARKMAN: Fifty or sixty –

MS. NIESS: Women.

JUSTICE MARKMAN: Muslim women –

MS. NIESS: A year.

JUSTICE MARKMAN: who wear full face cover, is that correct?

MS. NIESS: Yes.

JUSTICE MARKMAN: And each of whom under the current system –

MS. NIESS: Yes.

JUSTICE MARKMAN: would be willing to go report the abuse.

MS. NIESS: They would be willing to report the abuse, of course, as our speaker said before speaking directly to the religious faith following those rules, and if it came to that point they would completely abandon the whole process.

JUSTICE MARKMAN: Okay, so you're saying there's fifty or sixty women every year –

MS. NIESS: In Washtenaw County.

JUSTICE MARKMAN: of the Muslim faith who wear the full face coverings –

MS. NIESS: As evidenced today.

JUSTICE MARKMAN: who are not discouraged from cooperating fully with the police today who would be discouraged based on this rule.

JUSTICE YOUNG: These women now testify?

MS. NIESS: Pardon me? Would you please –

JUSTICE YOUNG: This same cohort of women now testify in court?

MS. NIESS: Well, they would. One thing –

JUSTICE YOUNG: Do they?

MS. NIESS: Do they? Yes.

JUSTICE YOUNG: Okay.

MS. NIESS: There is the *Crawford* case that occurred several years ago that has kind of changed testimony for survivors of domestic violence. I'm not gonna go into that today, but they would definitely be willing.

JUSTICE MARKMAN: So you're saying we should in our system here in Michigan have at least fifty or sixty illustrations of judges who've been confronted with the same problem as Judge Paruk in Hamtramck who resolved it a different way?

MS. NIESS: It seems on the face of the question that I would answer yes –

JUSTICE YOUNG: Okay. Are you aware that today judges have the power that Judge Paruk exercised?

MS. NIESS: Absolutely. And what I had said in the beginning of my comments sir, your honor, is that if it – it just takes one judge and then for that to kind of go like wildfire within the community. And I know that laws can't control rumor and innuendo and I know that. I'm not a lawyer, but at the same time I recognize that. And I don't wish to be in your chairs right now of having to make this decision. But what I do want to say is that there's got to be a way. I mean I think about – I've been looking around the room and thinking about the brilliance that's in this room, and there's got to be some way of –

JUSTICE YOUNG: There's doubt on that score.

MS. NIESS: I'm sorry? And I just think that there's got to be a way and I don't know what it is because I hear you – fifty or sixty people – do we change a whole system for that. I believe so because they're coming to me because they have hope. And I want to be able to say there's hope in this criminal justice system.

JUSTICE MARKMAN: I think the import of what Justice Young says is that we're not changing the system; we're retaining the same system that we've always had.

MS. NIESS: And to make it not mandatory would in the other colleagues words would help.

JUSTICE MARKMAN: Do you read mandatoriness into the language of the rule?

MS. NIESS: The – I understand about the shall have the discretion –

JUSTICE YOUNG: Reasonable control.

MS. NIESS: Reasonable control, excuse me.

JUSTICE YOUNG: We emphasis reasonable control. But you want it to be unreasonable control.

MS. NIESS: I want Muslim women to feel comfortable reporting.

JUSTICE YOUNG: I understand.

JUSTICE MARKMAN: But just one more question on the –

MS. NIESS: Absolutely, your honor.

JUSTICE MARKMAN: the magnitude of the problem which I'm trying to focus you on.

MS. NIESS: Yeah.

JUSTICE MARKMAN: You suggest there's at least fifty or sixty such cases in Washtenaw County alone in which judges have been confronted by the same issue that Judge Paruk was confronted by, and I'm wondering if you could give me an illustration in one of the Washtenaw County courts in which a court has been confronted with this same problem, and decided it apparently differently than Judge Paruk. If that judge has decided the same as Judge Paruk, we might have seen that case here of course. But –

MS. NIESS: Yeah, I mean they didn't, and I think it was because the judges felt like there's got to be a way to get the testimony in. I mean the fifty or sixty different women had all very different situations, very different circumstances. It's whether or not the *Crawford* rule applied in their case, and I would be happy to forward to the court a summary of those findings – to go through each and everyone of them today would not – I couldn't imagine it being accurate.

JUSTICE HATHAWAY: Have you thought about how this might possible affect the person who is an abuser if the Muslim woman, or any woman, was forced to testify without her garment and she refused to do that. It seems to me that may give that person more power, and actually suggest that he would not be punished for his actions. Have you thought about that?

MS. NIESS: I have not; I think you're spot on, your honor. And I think also – I don't interact with a lot of abusers, a lot of assailants, but it seems that it could play into the whole power and control wheel in terms of using – you know because they use economics, children, religion, everything they can to maintain a sense of power and control. So -

CHIEF JUSTICE KELLY: Thank you, Ms. Niess.

MS. NIESS: Thank you very much for your time, I appreciate it.

CHIEF JUSTICE KELLY: That concludes the statements on Item 2. Next Item 3 involves rule – court rule 2.403 relating to mediation and case evaluation. And Joan Binkow is here to make a statement.

ITEM 3: 2005-05, 2006-20 – MCR 2.403 etc.

MS. BINKOW: Hello your honors. I'm not an attorney so if I use all the wrong words I apologize. I am here to represent the Dispute Resolution Center in Washtenaw and Livingston County. We are one of the twenty community dispute resolution programs funded by the State Court Administrative Office. Our center is one of the mid-sized centers. We have 120 volunteer mediators; approximately 30 of them are listed on the court roster as individual practitioners in Washtenaw and Livingston County. And I'm here to express my appreciation for the proposed changes to these court rules in terms of mediation. For the first time we are seeing that not just individuals, but community dispute resolution centers can be listed on the court rosters. We know that many counties – Wayne County, Oakland County – have allowed that, but the ADR Committee of the Washtenaw trial court has continued to refuse to list the community dispute resolution center stating that only individuals can be listed, and we feel that that is not allowing open access to those of middle or low income who could have the possibility of seeking free or very low cost mediation services. Our mediators are the same who make their livings from practicing and do their pro bono work with us.

JUSTICE CORRIGAN: Ms. Binkow? Have you submitted that particular issue directly to our State Court Administrator –

MS. BINKOW: Yes.

JUSTICE CORRIGAN: to ask for relief?

MS. BINKOW: Yes.

JUSTICE CORRIGAN: And what's been the outcome of that?

MS. BINKOW: I know that he has spoken to the ADR trial court and they have pretty much stonewalled the situation over many years.

JUSTICE CORRIGAN: Is anything in these rules going to help on that score?

MS. BINKOW: I hope so, but I'm not sure. But what I'm seeing is this is the first time that you have changed the wording, and this is rule 2.410 ADR resolution – the ADR plan – including in establishing referral relationship with centers, or programs, courts, and that's never been included before. It's always just said mediators. And under 2.410(e) when it consists of the list of mediators you have added a (b) a community dispute resolution program center may appear on the roster of mediators provided the center selects and we meet all of those qualifications in terms of our mediators. My concern and I think this will do the job, we do still have some judges who don't believe in mediation and we're not sure why that's so. But you know we know that you do. Thank you. It works. But I am seeing under 2.410(2)(a) your use of the words "applicants and mediators". There's a suggestion there that doesn't include agencies. And I see over the

next couple of pages that that use of the word 3216 – this is under domestic relations list of mediators and applicant. You have never –

JUSTICE CORRIGAN: Would you make sure that you're putting your concerns about these into writing so that we have them. I can't say –

MS. BINKOW: I'd be happy to.

JUSTICE CORRIGAN: I can't say I've read anything by you.

MS. BINKOW: Okay.

JUSTICE CORRIGAN: But that would be real helpful.

MS. BINKOW: I'd be happy to. I would like it to be clear that an applicant doesn't just mean an individual or a mediator, but it continues to mean as you've defined a mediation center so that we can do a good job in providing for the lesser members of community.

CHIEF JUSTICE KELLY: Thank you, Ms. Binkow, we appreciate your time.

MS. BINKOW: Thank you very much. Nice to see you all.

CHIEF JUSTICE KELLY: No one's here on Item 4, so we'll move on to Item #5 which has to do with juror conduct. And it would require judges to instruct jurors that they are prohibited from using cell phones or other electronic devices when they are in attendance at trial or during deliberation, and it prohibits them from using the devices to obtain information about the case when they're not in the courtroom. We'd like to hear from Thaddeus Hoffmeister. He's not here. I know that Stuart J. Dunnings is here.

ITEM 5: 2008-33 – MCR 2.516 – Juror Conduct

MR. DUNNINGS: Good morning. May it please the Court.

CHIEF JUSTICE KELLY: Good morning.

MR. DUNNINGS: My name is Stuart Dunnings III; I'm the Ingham County Prosecutor. I'm here on behalf of the Prosecuting Attorneys Association. I apologize that the association didn't send me here to comment on the prior rule, but with respect to 2.516, we very much hope that you will adopt this rule. It has been a problem. We've had jurors who have accessed Wikipedia during the course of trials to determine the definitions of legal terms. We've had a juror in a criminal case who texted her divorce lawyer for advice on a criminal case. We've had jurors who have accessed OTIS, the

criminal history thing from the Department of Corrections, to look at defendants criminal histories from their personal devices during trials. And it goes on, and on, and on. While even just this morning while you were talking to the lady from Washtenaw County, I sent a text message to the Association to find out if Brian Mackie really has had veiled women refuse to testify. So it is a problem. The one – and looking through the other written comments that were posted on the website, the one thing I noticed was that while everybody seems to be generally in favor of the rules, for whatever reason the judges associations who like to tell other people what to do do not want this to be made mandatory. We would ask you to make this mandatory. There was a good comment from I believe one of the criminal defense attorneys that said that they believed that the jury instructions should be given at the time the jury is first brought in and not wait until the deliberations – until the jury is empanelled. And I think that is a good idea because once – when the jurors are sitting there and you're – you know you're pulling – you got a hundred people in there and you're trying to pull twelve people for a murder trial, those people are going to be doing something back there. And once they hear the names they could be you know accessing the old newspapers articles on the case. You have quite rightly in rules 3.6 and 3.8 put it on the prosecutors. You've given us special responsibilities with respect to protecting the information that goes into the public prior to the jury selection in order to support people's rights to fair trial. And we fight this very hard all the time. We get sued, we get excoriated in the press, and you quite rightly in *State News v Michigan State Univ* made the distinction that there's a difference between information and news. And our purpose – we have no problem with blocking information, but we don't think we should be working for the news organizations. And we think that the whole purpose of this is to make sure that jurors make their decisions based on properly admitted evidence during the course of a trial. And we just want to keep it that way, and we believe that this rule furthers that cause and we believe it is necessary because there have been problems.

CHIEF JUSTICE KELLY: So with respect, for example, to what the juror who's a mother and has small children if she's in the jury deliberation room when they're not deliberating they're waiting to be called in for example, is there a problem with her using a cell phone to check out – make sure her children are being cared for?

MR. DUNNINGS: I wouldn't have a problem – I just think that when they come there they ought to turn their devices over to the bailiff. If an emergency arises, if they get a text message or a phone call that something's wrong with their child, of course, they should have access to that. If during a break they want to you know send – call the school to see if their child's – or if they've got a child home that's ill they want to call and do that, I don't have a problem with that during the break you know where it can be somewhat monitored, but to just have – let them have free access to you know look at you know global maps to look at the crime scene – Google maps to look at the crime scene, which people have done. I mean questions – questions are going to come up,

people are gonna want answers. Sometimes they don't want to wait for the whole trial process to play out.

JUSTICE CORRIGAN: Mr. Dunnings? Chief Justice Kelly raised a concern that I had, and we need to regulate the conduct you're describing, but maybe we've cut to far in the way the rule's written right now because it might preclude these innocent you know I need a ride home from court today kind of communications. And I think in one of the suggestions if they want to communicate they have to call the courthouse and it seems like that will be a huge burden on the court. So I'm wondering if you have a thought on that score like Chief Justice Kelly's raised.

MR. DUNNINGS: Well, again, if the cell phones are there, if the bailiff has it or somebody says you know I need to call and get a ride, the bailiff can give them the phone and they can get a ride. There's nothing that says they have to have immediate access to the thing the entire time. When you have people come in here, when you go into court, judges say turn off your cell phones.

JUSTICE YOUNG: Well, let me – I have a theory about technology. We oughtn't impose on technology more than we impose on similar activities we conduct without technology. We currently today – we used to have newspapers, we used to tell people not to read them. We have television – we used to tell people not to listen to them. So I guess I'm asking why do we – why would we do more than instruct jurors that you may not use this newer technology to do research in the same way that they could do if they went prior to the fact – prior to the time we had Blackberrys and PDAs – they could have gone to the library and done this research. So I'm trying – I'm struggling to understand why just because we now have the availability of a library in our hands we should be doing more than saying you may not use that library whether it's at a physical location somewhere other than the court or you can bring it in on a PDA.

MR. DUNNINGS: Well, I think that's what we're doing here, but I –

JUSTICE YOUNG: Okay, but you also suggested another step to confiscate the PDAs from the jurors while they were in the courtroom.

MR. DUNNINGS: Well, if you – I would just say you turn the thing off when you're sitting on – in the jury box.

JUSTICE YOUNG: Well, I would assume that that would happen otherwise you get an embarrassing ring or something. I want to focus on another issue – by the way very snappy tie. The current – the rule currently is a rule – an instruction that applies after the jury is sworn, you believe that this should be a preliminary instruction that is given – at least a preliminary instruction that is given before the jury empanelling begins, correct?

MR. DUNNINGS: Correct.

JUSTICE YOUNG: Because I think you make an interesting point that as you're waiting to be empanelled you're hearing a lot of information and there – if you're not instructed you can't start researching the parties and the case you might well have information you shouldn't.

MR. DUNNINGS: Right.

JUSTICE YOUNG: Okay.

MR. DUNNINGS: I mean I don't think you should just give it the one time, I think you could give it at the time you know they come in –

JUSTICE YOUNG: Yeah, right.

MR. DUNNINGS: and then when you seat them and at the end of every day.

JUSTICE YOUNG: Okay.

MR. DUNNINGS: Most judges will say at the end of every day you know you're cautioned not to talk about the case, you're not to look at the newspaper, watch the news, but that doesn't cover this instantaneous access to all the information that's out there. And that's a huge problem.

JUSTICE YOUNG: Again, a very snappy tie.

MR. DUNNINGS: Thank you.

CHIEF JUSTICE KELLY: Thank you, Prosecutor Dunnings.

MR. DUNNINGS: Thank you very much.

CHIEF JUSTICE KELLY: Next is Item #6 which is a related item. We have two proposed alternatives to rule – court Rule 8.115, dealing with allowing attorneys to bring cell phones and other electronic communication devices into the courtroom, but either limiting or prohibiting their use during proceedings. Dawn Hertz. Jeff Kilpatrick. Kirkpatrick, right?

ITEM 6: 2008-35 – MCR 8.115

MR. KIRKPATRICK: Good morning. Jeff Kirkpatrick and I'm the Legislative Director for Michigan Court Officer/Deputy Sheriff's Association. And I realize that what you're here today on this has primarily to do with attorneys, however, my concern becomes when they ultimately draft whatever the final product is and the policies that courthouses begin to implement, what affect is it going to have on the court officers and law enforcement officers that walk in and out of those courthouses every day. And I understand the concerns of camera phones, but technology being what it is today if you're gonna get a quality phone it's gonna have a camera on it whether you like or not. And so I think the Court has the power to set sanctions that are appropriate to change one's behavior. And whether it's an attorney, a court officer, law enforcement officer you know I can walk into most courts with a gun, but I can't walk in with my cell phone? I'm just concerned where this is all gonna come out. So I know you're – the Court is looking at a carve out for attorneys, and as I read A and B I certainly prefer A over B, however, I would ask the Court to consider broadening – when you start that carve out – to other types of groups that might be affected that travel, or participate, or sit in a courtroom, and spend time in a courtroom. And that's really what I came to say.

CHIEF JUSTICE KELLY: Thank you.

MR. DUNNINGS: Thank you.

CHIEF JUSTICE KELLY: Patrick Clawson.

MR. CLAWSON: Good morning. I'm Pat Clawson. I'm a legal investigator and a process server based in Flint and in Washington, D.C. I share some of Mr. Kirkpatrick's concerns about this. I – my basically – I have three concerns about this. I believe that the proposed rule is too broad and it's overreaching. I believe that it presents practical problems that would adversely affect the administration of justice. And I also believe there's an equal protection of the law issue here that the Court needs to consider. The issue here is preserving courtroom decorum. On that there's no disagreement. Judge, you should have absolute authority to protect the decorum of their courtrooms. But the proposed rule permits attorneys and attorneys only to bring electronic devices into court facilities. The term court facilities is not defined. I have a big problem with banning the public and the press for bringing, phones, Blackberries, and portable computers into courthouses as opposed to courtrooms. The issue here is that across the state of Michigan, we have many courts that are housed in government buildings that contain other government agencies involving executive and legislative branches of government. By barring electronics from a court building, you also have the affect of blocking the ability of citizens to use those devices in those buildings in connection with nonjudicial business, such as meetings of a county board of supervisors –

JUSTICE YOUNG: If this were limited to the courtroom, is that a problem for you?

MR. CLAWSON: Well, it's not clearly defined. The rule states court facilities.

JUSTICE YOUNG: I'm asking if that were clearer in the rule would you have a problem?

MR. CLAWSON: If it was clear that it restricted solely to the courtroom, I would not have a problem with that at all. The – there is, however, a – an equal justice issue here. The rule pertains to attorneys bringing electronic devices into the courts. What about pro se litigants? What about the self-represented? They need to be on the same equal footing if they're participating in actions inside of a courtroom as any member of the Michigan Bar. The proposed rule, as Mr. Kirkpatrick points out, does not permit courthouse staff, court officers, private investigators, process servers like me, paralegals, news reporters, or others that have bona fide business in the court to be able to use electronic devices or to bring them into the courts. That's not good for the administration of justice. We need to be able to allow open access. I am concerned about any kind of a court rule that creates a privileged class of people in this state. I don't know why attorneys necessarily have to be more privileged than John Doe citizen to bring an electronic device into a courtroom or a court facility that's been paid for with taxpayer dollars and that 's actually owned by the taxpayers.

JUSTICE HATHAWAY: Well, sir?

MR. CLAWSON: Yes, Ma'am.

JUSTICE HATHAWAY: If the rule said attorneys or individuals or have business before the court, may carry cell phones or other portable electronic communication devices into any courtroom, you would be satisfied with that?

MR. CLAWSON: Courtroom certainly narrows it down.

JUSTICE HATHAWAY: And adding or individuals who have business before the court would satisfy you.

MR. CLAWSON: That certainly narrows it down and makes it a more precise rule. What I think what we want to avoid here is just a blanket ban on the public from being able to use electronic devices in buildings that have courtrooms in them, but also have other types of governmental functions in them as well. So the narrower – the more narrowly drawn the rule is, the more affective the rule is going to be, and the more its going to actually enhance courtroom decorum.

JUSTICE YOUNG: So if we – in the proposal B struck attorneys may carry cell phones or other portable electronic devices into any court facility, and simply began each

judge may determine a policy with regard to use of cell phones, etc., devices within the judge's courtroom, that would be sufficient.

MR. CLAWSON: I think every judge has the authority to set whatever policy they want to set in their particular courtroom to preserve decorum. I don't think that there's any – any serious issue with that. The judges already have that authority.

JUSTICE YOUNG: Yeah, okay, thank you.

CHIEF JUSTICE KELLY: Thank you, sir.

MR. CLAWSON: Thank you very much.

CHIEF JUSTICE KELLY: No one's here on Item 7 so that concludes our public hearing.